UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS AND INTERFERENCES

Ex parte BYRAN SPIESS

Appeal No. 2006-1692
Application No. 10/068,243
Technology Center 3726

ON BRIEF

Before CRAWFORD, LEVY, and FETTING, Administrative Patent Judges.
LEVY, Administrative Patent Judge.

DECISION ON APPEAL

This is a decision on appeal from the examiner's final rejection of claims 1-13, which are all of the claims pending in this application.

We AFFIRM-IN-PART.

BACKGROUND

The appellant's invention relates to a roller for conveyor belts, which provides means for immediate visual inspection (specification, page 1).

Claim 1 is representative of the invention, and is reproduced as follows:

1. An aircraft roller system comprising:

(1) a roller adapted to communicate cargo into and out of an aircraft, the roller being cylindrical in shape having a length and a diameter, the roller having a center aperture extending through the length of the roller and the roller being fabricated from a polymer, the polymer having a burn rate of less than 4.0 inches per minute, a compressibility strength of a least 200 psi, impact strength of at least 0.5(ft.lbs.)/inch, flexural strength of at least 20 psi;

(2) a shaft in the form of an elongate cylinder having a diameter sized to rotatably fit within the central aperture of the roller, the shaft further having means for retention located upon the shaft ends;

(3) an elongate "U" shaped roller rack, the roller rack sized to extend the length of the roller and having a pair of upwardly extending ends located adjacent the ends of the roller, each end having an aperture sized to receive the respective shaft end and located the shaft in a fixed location the rack being joined to an aircraft.

The prior art references of record relied upon by the examiner in rejecting the appealed claims are:

Thompson et al. (Thompson)	4,203,509	May 20, 1980
Rowles	6,354,424	Mar. 12, 2002 (filed Jun. 1, 2000)

Claim 6 stands rejected under 35 U.S.C. § 112, first paragraph, as containing subject matter which was not described in the specification in such a way as to reasonably convey to one skilled in the relevant art that the inventor, at the time the application was filed, had possession of the claimed invention; and in particular, as containing new matter.

Claims 7, 10, and 13 stand rejected under 35 U.S.C. § 102(b) as being anticipated by Thompson.

Claims 1-6, 8, and 9 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Thompson in view of Rowles.

Claims 11 and 12 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Thompson.

Rather than reiterate the conflicting viewpoints advanced by the examiner and the appellant regarding the above-noted rejections, we make reference to the answer (mailed March 8, 2004) for the examiner's complete reasoning in support of the rejections, and to the brief (filed December 12, 2003) and reply brief (filed June 10, 2004) for the appellant's arguments thereagainst.

Only those arguments actually made by appellant have been considered in this decision. Arguments which appellant could have made but chose not to make in the brief have not been considered. See 37 CFR § 41.37(c)(1)(vii)(eff. Sept. 13, 2004).

OPINION

In reaching our decision in this appeal, we have carefully considered the subject matter on appeal, the rejections advanced by the examiner, and the evidence of lack of written description, anticipation and obviousness relied upon by the examiner as support for the rejections. We have, likewise, reviewed and taken into consideration, in reaching our decision, appellant's arguments set forth in the briefs along with the examiner's rationale in support of the rejections and arguments in rebuttal set forth in the examiner's answer.

Upon consideration of the record before us, we make the determinations which follow. We begin with the rejection of claim 6 under 35 U.S.C. § 112, first paragraph, as lacking written description.

The written description requirement serves "to ensure that the inventor had possession, as of the filing date of the application relied on, of the specific subject matter later claimed by him; how the specification accomplishes this is not

material." In re Wertheim, 541 F.2d 257, 262, 191 USPQ 90, 96 (CCPA 1976). In order to meet the written description requirement, the appellant does not have to utilize any particular form of disclosure to describe the subject matter claimed, but "the description must clearly allow persons of ordinary skill in the art to recognize that [he or she] invented what is claimed." In re Gosteli, 872 F.2d 1008, 1012, 10 USPQ2d 1614, 1618 (Fed. Cir. 1989). Put another way, "the applicant must . . . convey with reasonable clarity to those skilled in the art that, as of the filing date sought, he or she was in possession of the invention." Vas-Cath, Inc. v. Mahurkar, 935 F.2d 1555, 1563-64, 19 USPQ2d 1111, 1117 (Fed. Cir. 1991). Finally, "[p]recisely how close the original description must come to comply with the description requirement of section 112 must be determined on a case-by-case basis." Eiselstein v. Frank, 52 F.3d 1035, 1039, 34 USPQ2d 1467, 1470 (Fed. Cir. 1995) (quoting Vas-Cath, 935 F.2d at 1561, 19 USPQ2d at 1116).

The examiner's position (answer, page 3) is that the term "homogenous" constitutes new matter. The examiner notes that although the original specification has support for the term "monolithic," (only one layer), there is no support for the term "homogenous" which could have more than one layer.

Appellant asserts (brief, page 4) that to ascertain the meaning of a claim, the governing authority considers three sources; i.e., the claims, the specification and the prosecution history. It is asserted (id.) that dictionary definitions are secondary and are not to trump the meaning from the specification. The disclosure explains that the roller is a solid piece of polymer with specific properties that are expressed in the claims. It is argued (id.) that "[i]nstead of interpreting "monolithic" and "homogenous" as having the same meaning, e.g., in light of the specification and dictionary, the Examiner opted to interpret "homogenous" in a manner consistent with a dictionary definition, a secondary source, that is incongruous with the disclosure, primary source". Appellant points out that claim 6 does not recite "homogenous thickness," but rather recites "homogenous roller." It is argued (brief, pages 5 and 6) that "[i]nterpreting the term homogenous in light of the specification results in a definition that is synonymous with monolithic; a 'roller of the same nature, solid and uniform (definitions of monolithic and homogenous merged to show consistent meaning)."

The examiner responds (answer, page 8) that the term "homogenous" was added to the disclosure in the amendment filed

March 19, 2003, and that the specification has no description or definition of the term "homogenous." It is argued (id.) that by adding the term "homogenous" appellant is attempting to cover more than what was disclosed because "homogenous" could cover a roller with multiple layers of multiple materials, whereas appellant's monolithic roller can only be made of a single layer with a single material.

In the reply brief, appellant asserts (page 2) that "Applicant and the Examiner agree that "monolithic" means solid and uniform. This definition is consistent with the term "homogenous", which means "of the same or a similar kind or nature" or "uniform in structure or composition throughout" Appellant adds (reply brief, pages 2 and 3) that "[a]ccording to binding precedent, "monolithic" and "homogenous", which can be interpreted as being consistent are to be interpreted as being consistent."

From our review of the specification, we find that the term "homogeneous" does not appear, and agree with the examiner that there is no definition or description of the term in the specification as originally filed. From our review of the specification, we additionally find that:

(1) "the roller is a generally integral single piece component formed of suitable polymer." (page 3).

(2) "[w]here conventional rollers are assembled from numerous parts, usually metal, to produce a hollow roller, the conveyer roller of the present invention departs by being constructed as a monolithic unit from a polymer material.) (page 3).

(3) "[i]t is an advantage of the invention to provide a monolithic roller." (page 4).

(4) "[m]anufacturing may be made simple by machining an elongate piece of round stock to a suitable diameter, boring the stock, cutting to length and detailing the ends to suit. Surprisingly, it is efficient to machine rollers 10 from readily available round stock." (page 6).

The specification discloses that the roller is formed from an integral, single piece component formed of polymer, and that the monolithic construction may be made by machining a piece of round stock, boring the stock, cutting to length and detailing the ends. We find from the specification that monolithic refers to being formed from a single piece of material. This is consistent with the dictionary definition of being constructed of

a single piece of material.[1] Turning to the term "homogenous," as the term does not appear at all in the specification, we look to a dictionary for a definition of the term. Because appellant asserts (brief, page 5) that the examiner has used a dictionary that defines the term in a manner that is incongruous with the disclosure, we again rely upon the McGraw-Hill Dictionary of Scientific and Technical terms for a definition of "homogenous." The term is defined as pertaining to a substance having uniform composition or structure.[2] From the definition of the term "homogenous" we find that the term is not the same as monolithic, but rather is broader and more encompassing because uniform composition or structure does not have to be formed from a monolithic stock material as disclosed in appellant's specification.

We are not persuaded that this definition, or the examiner's definition, is incongruous with the specification because there is nothing in the specification defining or describing the term "homogenous" for us to compare with. We find that the definition of the term "homogenous" located by the Board, is broad enough to

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[1] McGraw-Hill Dictionary of Scientific and Technical Terms, Second Ed., 1969. A copy of the pertinent page is enclosed with the Decision on Appeal.

[2] A copy of the definition of the term "homogenous" is also enclosed with the Decision on Appeal.

read on an article made of plural layers of the same material, or multiple layers of different materials that are of the same or similar thickness, as advanced by the examiner. On page 2 of the reply brief, appellant defines "homogenous" as being "of the same or a similar kind or nature" or "uniform in structure or composition throughout." From the definition provided by appellant, we similarly find, for the reasons, supra, that "homogenous" and "monolithic" do not have the same meaning. Nor do the terms have the same scope, with the term "homogeneous" being broader and more encompassing that "monolithic". In addition, on page 5 of the reply brief, appellant's state "Applicant's interpretation of 'homogeneous', e.g. solid structure." However, our interpretation of the term is broader than a solid structure, and we find nothing in the specification or claim that would limit the interpretation of the term "homogeneous" to mean a solid structure. In any event, a solid structure may not be homogeneous, e.g., a uniform distribution of substances[3]. From all of the above, we agree with the examiner that the term "homogenous" lacks written description in the specification as originally filed, and constitutes new matter.

[3] Hawley's Chemical Dictionary, Thirteenth Edition, ©1997. A copy of this definition of "homogeneous" is enclosed with the Decision on Appeal.

The rejection of claim 6 under 35 U.S.C. § 112, first paragraph, is sustained.

We turn next to the rejection of claims 7, 10, and 13 under 35 U.S.C. § 102(b) as being anticipated by Thompson. To support a rejection of a claim under 35 U.S.C. § 102(b), it must be shown that each element of the claim is found, either expressly described or under principles of inherency, in a single prior art reference. See Kalman v. Kimberly-Clark Corp., 713 F.2d 760, 772, 218 USPQ 781, 789 (Fed. Cir. 1983), cert. denied, 465 U.S. 1026 (1984). We note at the outset that appellant has not presented separate arguments for claim 10, but rather states (brief, page 6) that claims 7 and 10 stand or fall together. The examiner's rejection can be found on pages 3 and 4 of the answer.

Appellant asserts (brief, page 6) that Thompson does not show a roller fabricated from a polymeric material, but rather a roller that has a polymeric part. It is argued (brief, page 7) that "[i]n particular, Thompson et al, teaches that his polymer is not capable of supporting the weights borne by rollers" because of the disclosure that "with increasing load, the tire is locally flattened to the limiting radial extent R_1 minus R_2, whereupon all further increments of load are sustained by flange surfaces 15 alone." It is additionally argued (id.) that

Thompson does not disclose the claimed burn rate of less than 4 inches per minute. It is further argued (id.) that "the Examiner automatically assumed, without support, that nylon has all the physical properties required for solid aircraft roller, since nylon is in applicant's list of suitable polymers for a general type of roller." It is asserted (brief, pages 7 and 8) that the examiner has made a leap of faith in finding that since Thompson uses nylon, his polymer must also have the physical properties that applicant discloses for an aircraft roller fabricated from a polymeric material. Appellant adds in the footnote at the bottom of page 8 that "[t]here is perhaps an infinite number of nylons all with varying physical properties, but the Examiner treats all nylons as having the same physical properties.

We begin our analysis with claim construction. Before addressing the examiner's rejections based upon prior art, it is an essential prerequisite that the claimed subject matter be fully understood. Analysis of whether a claim is patentable over the prior art under 35 U.S.C. § 103 begins with a determination of the scope of the claim. The properly interpreted claim must then be compared with the prior art. Claim interpretation must begin with the language of the claim itself. See Smithkline Diagnostics, Inc. v. Helena Laboratories Corp., 859 F.2d 878,

882, 8 USPQ2d 1468, 1472 (Fed. Cir. 1988). Accordingly, we will initially direct our attention to appellant's claim 7 to derive an understanding of the scope and content thereof.

We find that the claim 7 language "the roller is fabricated from a polymeric material" does not require that the roller is fabricated from a monolithic block of stock material. Rather, from the use of the transitional phrase "comprising," and the broad statement that the roller is fabricated from a polymeric material, we find that the roller can be fabricated from more than just a polymeric material, and can be fabricated from a polymeric material along with other materials, such as metal. We find nothing in the language of the claim that would limit the roller to only being formed from a single piece of polymeric material. Nor does the claim recite the type of polymeric material used. What is required is that the roller be an aircraft roller that has a burn rate of less than 4 inches per minute.

Turning to Thompson, we find that the reference is directed to a cargo roller for an airplane (col. 1, lines 4-6). The economics of the air-freight industry demand that cargo aircraft be capable of carrying the maximum possible freight load, consistent with safe operation (col. 1, lines 7-9). This has led

to a demand for lighter-weight components as to allow carrying additional cargo while keeping the total aircraft weight the same (10-12). It was known to use a tubular aluminum shell with a nylon tire molded onto the shell. This provided the desired weight reduction, but abusive loads caused the nylon tire to crack, leading to premature failure (col. 1, lines 21-25). An object of the invention is to produce a cargo roller with a molded nylon tire that will not be subjected to significant abuse in the presence of an overload on the roller (col. 1, lines 38-41). The cargo roller has a rigid tubular body 10 covered by a solid tire 17 of plastic material such as nylon (col. 1, line 60 through col. 2, line 14). Thompson further discloses (col. 2, lines 63-65) that the described construction is found to satisfy all stated objects and to provide long life in a light-weight product which will sustain even the worst loads. It is further disclosed (col. 3, lines 21-28) that "[t]he injected tire material is basically a tough variety of nylon, which may be compounded with or more additional materials selected from the group one including carbon black, elastomeric material, and glass fiber; and we have obtained our highly satisfactory results using a so-called super-tough nylon known as Zytel, ST-100 Series, being a product of the DuPont Company, Wilmington, Delaware."

From the disclosure of Thompson that the aircraft roller is fabricated from nylon and metal, we find that the aircraft roller meets the claimed "fabricated from a polymeric material," since the claim does not preclude fabrication from other materials in addition to the polymeric material. From the disclosure that the roller is for use in aircraft, that it is capable of sustaining even the worst loads, and that the nylon used is a "super-tough nylon" we find that Thompson's disclosure is sufficient to establish a prima facie case of anticipation of claim 1. Note that with respect to the claim language of "having a burn rate of less than four inches per minute" we agree with the examiner that because the roller of Thompson is for use in an aircraft roller and is from a super-tough nylon, that the roller will inherently have the characteristics required for being used in the airline industry, as recited in claims 7, 10 and 13. Because the super-tough nylon of Thompson is of the material claimed, is used for the same purpose, and is used in the same environment as the claimed roller, we find that the disclosure of Thompson is sufficient to establish a prima facie case of anticipation of claim 7 and shift the burden for production of evidence to appellant to show that the roller of Thompson would not inherently have the claimed burn rate.

> Where the claimed and prior art products are identical or substantially identical in structure or composition, or are produced by identical or substantially identical processes, a prima facie case of either anticipation or obviousness has been established. In re Best, 562 F.2d 1252, 1255, 195 USPQ 430, 433 (CCPA 1977). "When the PTO shows a sound basis for believing that the products of the applicant and the prior art are the same, the applicant has the burden of showing that they are not." In re Spada, 911 F.2d 705, 709, 15 USPQ2d 1655, 1658(Fed. Cir. 1990). Therefor, the prima facie case can be rebutted by evidence showing that the prior art products do not necessarily possess the characteristics of the claimed product. In re Best, 562 F.2d at 1255, 195 USPQ at 733. See also Titanium Metals Corp. V. Banner, 778 F.2d 775, 227 USPQ 773(Fed. Cir. 1985).

We are not persuaded by appellant's assertion (brief, page 7) that Thompson teaches that his polymer is not capable of supporting the weights borne by rollers. The passage referred to by appellant is discussing how the invention does not require tire 17 to take on excess force during overload conditions. This is supported by Thompson's disclosure that his invention overcomes problems in the prior art where the tire was overloaded and failed prematurely (col. 1, lines 19-25 and 38-41). This is further supported by the disclosure of Thompson (col. 2, lines 63-65) that "the described construction is found to satisfy all stated objects and to provide long life in a light-weight product which will sustain even the worst loads."

Nor are we persuaded by appellants assertion (brief, page 7) that "the Examiner automatically assumed, without support, that nylon has all the physical properties required for solid aircraft roller, since nylon is in applicant's list of suitable polymers for a general type of roller." From our review of appellant's specification, we find that the reference to nylon on page 5 is not referring to a general type of roller, but rather to roller 10 of appellant's invention. Nor are we persuaded by appellant's assertion (brief, page 8) that Thompson does not disclose the compressibility strength, impact strength and flexural strength of claim 13. From our findings, supra, that Thompson discloses the roller to be fabricated from super-tough nylon, to be used for an aircraft cargo roller, to be able to sustain even the worst loads, we find that the cargo roller of Thompson will inherently have the characteristics required for an airplane roller, as recited in claim 13.

Nor are we persuaded by appellant's assertion (reply brief, page 4) that Thompson is fabricated with a polymeric material, not from a polymeric material. From our claim construction, supra, we find that the language "fabricated from a polymeric material" and the use of the transitional phrase comprising, that the claim language is broad enough to be fabricated from other

materials in addition to the polymeric material. Accordingly, we find that Thompson is fabricated from a polymeric material.

Nor are we persuaded by appellant's assertion (reply brief, page 6) that "the particular physical properties were identified in applicant's declaration filed March 19, 2003 as being important to aircraft rollers differentiated from standard use."

The rollers of Thompson are not for standard use, but rather are specifically directed to cargo rollers for aircraft, with the rollers being specifically designed to handle the worst loads without product failure, which occurred in the past when nylon rollers were used.

Turning to the Declaration of the inventors, Bryan Spiess, and of John Dallum, we find that the Declaration discusses the advantages of appellant's polymeric roller. However, a polymeric roller is not claimed. What is recited in claims 7, 10 and 13 is an aircraft roller fabricated from a polymeric material. The Declaration states that although the Declarants have been in the field of aircraft roller system repair and maintenance for about 25 years, that they have never seen an aircraft roller formed from plastic, and that the FAA was surprised that the inventors have created a polymeric roller that would work on aircraft.

As we found, supra, from our claim construction, the claims are not limited to a roller fabricated solely from polymeric material, or from a single piece of polymeric material. We are cognizant of the differences between the rollers of Thompson and the rollers disclosed by the appellant. However, these differences have not been specified in appellant's claims.

We agree with the Declaration that the requirements for airplane rollers are different from the requirements of regular rollers, such as the rollers for a boat trailer. However, Thompson is directed to a roller for an airplane that is fabricated, inter alia, from polymeric material, and is used for the same purpose and in the same environment as appellant's rollers. We are not persuaded that the super-tough nylon of Thompson will function differently from the nylon disclosed in appellant's specification. Although we have considered the Declaration, it is inapplicable to a rejection under 35 U.S.C. § 102.

From all of the above, we are unconvinced of any error on the part of the examiner in rejecting claims 7, 10 and 13 under 35 U.S.C. § 102(b) as being anticipated by Thompson. The rejection of claims 7, 10 and 13 under 35 U.S.C. § 102(b) is sustained.

We turn next to the rejection of claims 1-6, 8 and 9 under 35 U.S.C. § 103(a) as being unpatentable over Thompson in view of Rowles. In rejecting claims under 35 U.S.C. § 103, it is incumbent upon the examiner to establish a factual basis to support the legal conclusion of obviousness. See In re Fine, 837 F.2d 1071, 1073, 5 USPQ2d 1596, 1598 (Fed. Cir. 1988). In so doing, the examiner is expected to make the factual determinations set forth in Graham v. John Deere Co., 383 U.S. 1, 17, 148 USPQ 459, 467 (1966), and to provide a reason why one having ordinary skill in the pertinent art would have been led to modify the prior art or to combine prior art references to arrive at the claimed invention. Such reason must stem from some teaching, suggestion or implication in the prior art as a whole or knowledge generally available to one having ordinary skill in the art. Uniroyal, Inc. v. Rudkin-Wiley Corp., 837 F.2d 1044, 1051, 5 USPQ2d 1434, 1438 (Fed. Cir. 1988); Ashland Oil, Inc. v. Delta Resins & Refractories, Inc., 776 F.2d 281, 293, 227 USPQ 657, 664 (Fed. Cir. 1985); ACS Hosp. Sys., Inc. v. Montefiore Hosp., 732 F.2d 1572, 1577, 221 USPQ 929, 933 (Fed. Cir. 1984). These showings by the examiner are an essential part of complying with the burden of presenting a prima facie case of obviousness. Note In re Oetiker, 977 F.2d 1443, 1445, 24 USPQ2d 1443, 1444

(Fed. Cir. 1992). If that burden is met, the burden then shifts to the applicant to overcome the prima facie case with argument and/or evidence. Obviousness is then determined on the basis of the evidence as a whole. See id.; In re Hedges, 783 F.2d 1038, 1039, 228 USPQ 685, 686 (Fed. Cir. 1986); In re Piasecki, 745 F.2d 1468, 1472, 223 USPQ 785, 788 (Fed. Cir. 1984); and In re Rinehart, 531 F.2d 1048, 1052, 189 USPQ 143, 147 (CCPA 1976).

The examiner's position (answer, pages 4-7) is that Thompson does not disclose the shaft within the aperture of the roller, the retention means and the u-shaped roller rack. To overcome this deficiency of Thompson, the examiner turns to Rowles for a teaching of these features.

Appellant's position (brief, pages 8-11) is to repeat arguments relating to Thompson, and assert that the polymers specified in claims 2 and 3 are not found in Rowles or Thompson. It is further asserted that Rowles and Thompson do not disclose the claimed physical properties.

At the outset, we make reference to our findings, supra, with respect to claim construction, and the teachings, express and inherent, in Thompson. Appellant does not dispute the teachings of Thompson or the combinability of the references, but rather implies that the combined teachings would not have

resulted in the invention of claims 1-6, 8 and 9. We make reference to our findings, supra, with respect to the Declaration by the co-inventors. The Declaration is unpersuasive for the reasons, supra, and because the Declaration does not address the Thompson reference. From the disclosure of Rowles, we agree with the examiner that an artisan would have been motivated to use the cargo roller support system of Rowles with the cargo roller of Thompson for the reasons advanced by the examiner in the answer, (pages 4-6). Accordingly, the rejection of claim 1 is sustained, along with claims 4 and 5 which depend therefrom, and which have not been separately argued. Turning to claims 2, 3 and 6, we note at the outset our interpretation, supra, of the term homogeneous. From the disclosure of Thompson of having two layers, each which is homogeneous, we find that the term homogeneous of claim 6 is met. We turn next to the issue of the polymers recited in claims 2, 3 and 6. From the disclosure of Thompson of using nylon, which appellant lists along with the claimed polymers in the specification as being suitable for the claimed roller, we find that the disclosure of super-tough nylon in Thompson would have suggested one or more of the polymers set forth in claims 2, 3 and 6. Appellant presents no convincing reasons why the disclosed super-tough nylon would not have

suggested the polymers recited in claims 2,, 3 and 6. Accordingly, the rejection of claims 2, 3 and 6 under 35 U.S.C. § 103(a) is sustained, along with claims 8 and 9, as appellants have not provided any reasons why they believe that the physical properties recited in claims 8 and 9 would not have been taught or suggested by Thompson and Rowles.

We turn next to the rejection of claims 11 and 12 under 35 U.S.C. § 103(a) as being unpatentable over Thompson. We will sustain the rejection of claims 11 and 12 for the same reasons as we sustained the rejection of claims 2 and 3.

CONCLUSION

To summarize, the decision of the examiner to reject claim 6 under 35 U.S.C. § 112, first paragraph is affirmed. The decision of the examiner to reject claims 7, 10 and 13 under 35 U.S.C. § 102(b) is affirmed. The decision of the examiner to reject claims 1-6, 8, 9, 11 and 12 under 35 U.S.C. § 103 is affirmed.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 CFR § 1.136(a)(1)(iv).

AFFIRMED-IN-PART

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